Supreme Court, U.S.
FILED
02 916 DEC 11 2002
OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

BECKY M. LITOWITZ,
Petitioner,

v.

DAVID J. LITOWITZ,
Respondent.

Petition for Motion for Reconsideration to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

50 pp

QUESTIONS PRESENTED FOR REVIEW

In view of the fundamental right to self determination, can cryogenically preserved human embryos be deemed "property" under the United States Constitution?

Can a non-biologically related person have a constitutionally protected interest in a preserved human embryo?

PARTIES

Petitioner is Becky Litowitz. Respondent is David Litowitz.

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE

The judgment of the Washington Supreme Court, the order denying rehearing, and modification of the opinion of the Washington Supreme Court appear in the Appendix hereto.

STATEMENT OF JURISDICTIONAL BASIS

This case arises from a judgment entered by the highest court of the State of Washington. Thus, 28 U.S.C. § 1257(a) confers jurisdiction on this Court.

This Petition is filed following entry of an order denying rehearing of the case before the Washington Supreme Court. The order denying rehearing was entered on September 12, 2002.

United States Supreme Court Rule 13(3) allows Petitioner until December 12, 2002, to file this petition.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE

This case implicates the First, Ninth, and Fourteenth Amendments to the United States Constitution.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment states, in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

With the advent of human cloning, the proliferation of legally recognized same-sex relationships, and the fact that nearly two hundred thousand human embryos are in cryogenic preservation, throughout the United States, there

are compelling reasons for granting review. The legal status of embryos currently conflicts with this Court's reproductive rights jurisprudence, and the states have not assisted in clarifying the issues surrounding the decision to start a family through 'artificial means.' The constitutional definition of the term "parent" is unconstitutionally vague and ambiguous, given the current state of the law.

On or about July 15, 1980, Petitioner Becky Litowitz was rendered infertile and medically incapable of carrying children.

In March of 1996, as a result of desiring to be a parent, Petitioner and her then husband, David Litowitz, entered into the *in vitro* fertilization (hereinafter referred to as "IVF") contracts that are the subject matter of this petition for review. The contracts were entered into in the State of California. The couple lived in the State of Washington at all relevant times.

Under the terms of the first contract, Mr. Litowitz' sperm would be, and was, used to fertilize human ova donated by one J.Y. (egg donor), with the consent of one E.Y. (husband of egg donor). The California IVF contract was entered into on or about March 21, 1996.

As a result of the parties' performance on the IVF contract, five genetically unique human embryos were created, and lawfully adopted by Petitioner and her husband. The embryos are, and were, genetically distinct from their progenitors and all other human beings.

Three of the Litowitz family's human embryos were successfully implanted in a third-party surrogate mother. The surrogate gave all rights to any prospective child to the Litowitz' family.

While two of the Litowitz' human embryos did not survive implantation, a daughter ("M.") was born to the surrogate and

is the lawful child of Petitioner. Becky Litowitz has joint legal custody of M. and is the legal mother of M. Petitioner and Mr. Litowitz already had a biological child at the time of M.'s birth.

While not biologically related to the remaining human embryos, Petitioner is the legal mother of these human embryos, and has been their protector since March of 1996. She continues in her role as protector of them to this day. Because Becky Litowitz is, contractually, the intended parent of the embryos, she is an adoptive and legal parent. It is because of these facts that Petitioner seeks to have her interest in the embryos recognized as a part of her constitutional right to be a parent and to raise children.

Petitioner, along with her husband, contracted with Loma Linda University Medical Center, in California, to cryogenically preserve the remaining human embryos. Loma Linda agreed to provide such cryopreservation services and drafted contracts accordingly. This issue is in litigation.

Petitioner believes that, at the very least, under law, the human embryos, are, or ought to be, entitled to the special respect due all human life, including the opportunity for implantation and gestation. The State of Washington has failed to recognize Petitioner's status as a 'parent.'

ARGUMENT FOR REVIEW

I. THERE IS DIVISION AMONG SEVERAL STATES AS TO THE LEGAL STATUS OF HUMAN EMBRYOS

"Although one might think that consent agreements outlining ownership rights [of embryos] in cases of divorce or separation would solve any disagreements, such is not the case. Recent state court decisions demonstrate the opposing views among courts regarding the effectiveness of consent agreements. [fn]. State courts with little, if any, guidance

from legal precedent or their state legislatures face the daunting task of determining the validity of these agreements. State courts confronting such decisions might have to examine property, constitutional, and contract law before reaching a conclusion. [fn]." Matthew Ellis, *In Vitro Fertilization and Consent Agreements: Where Does California Stand?*, 42 Santa Clara L.Rev. 1191, 1192 (2002).

While there is little doubt that the right of self determination, including the decision to be a parent, is fundamental [1], the courts of this nation have been inconsistent in their treatment of this intensely important constitutional issue.

The Tennessee Supreme Court has held that human embryos are neither "property nor "persons." Where there is a dispute over the 'ownership,' Tennessee engages in a balancing test, giving preference to progenitors. Important to analysis of the instant case, it was specifically recognized that there is a federally protected interest in the right to procreate. However, the family in *Davis* did not sign an IVF consent agreement, as did the parents in the instant case and other cases mentioned below. *Davis v. Davis*, 842 S.W.2d 588, 598-602 (Tn. 1992).

In New York it has been held that embryos *may* be entitled to "special respect" under the law, just as in *Davis*. *Kass v. Kass*, 91 N.Y.2d 554, 564-565 (N.Y. 1998). However, the *Kass* Court did not conclude that the woman's right of privacy in reproductive choice was invoked simply because of the existence of cryogenically preserved embryos related to her. *Id.* Without committing to a public policy stance that would make all IVF consent agreements enforceable, the Court concluded that one can look to the parties' intentions to

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[1] *See generally, Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

determine disposition. In *Kass*, neither party could lay claim to the embryos. *Id.* at 565-566, 569.

In Massachusetts, that state's highest court has held that, where an unambiguous IVF consent form, by its terms, allowed the embryos to be given to the mother following divorce, it could still find pragmatic ambiguity as to disposition of the embryos. The Court also concluded that, as a matter of public policy, it would not force one to become a "parent" at the will of an ex-spouse. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-1058 (Mass. 2000).

A federal court in Virginia has dealt with the relevant issues by recognizing that biological parents' "proprietary interests" in frozen embryos were limited to the options set forth in any written agreement between the parents. The independent legal status of human embryos was not established. *York v. Jones*, 717 F.Supp. 421, 423-425 (E.D. Va. 1989).

In California, human byproducts (including sperm) cannot be deemed property per se'. *Moore v. Regents of the University of California*, 51 C.3d. 120, 136-137 (1990). *See also,* Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 Loy. L.A. L.Rev. 381 (1999). The Court did not attempt to address the issue of what occurs when genetic individuation occurs during conception. If it is that one cannot "own" one's own sperm or cell lines, then one must certainly conclude that one cannot possibly own a genetically unique human embryo.

Nevertheless, California has allowed a woman to extend what appears to be an 'ownership' interest to the cell lines of a deceased husband, over the objections of his biological family. *Hecht v. Superior Court*, 16 Cal.App.4th 836 (Cal.App. 1993), review denied.

Finally, in *Johnson v. Calvert*, 851 P.2d. 776 (1993), the California Supreme Court recognized that a surrogate mother

and biological mother could possess "equal" maternity rights under the Uniform Parentage Act. *Id.* at 781.

What can be construed from the varying opinions on the status of stored human embryos is that there is no identifiable consistency in the states' opinions. Review is needed because the inconsistency of the states relates to a fundamental right under the United States Constitution. While one might be inclined to argue that this case gives rise to a "states rights" issue, firmly established jurisprudence on reproductive freedom and the right to self determination suggests otherwise. *Casey, supra.* The importance of the present issues to unmarried persons, single parents, same-sex couples, preborn human life, and healthcare providers cannot be understated.

If the lower court decision is left standing, one is left to believe that human embryos do not have the "special respect" recognized in *Kass* and *Davis*. Moreover, one is left to believe that an adoptive or intended parent's rights deserve lesser recognition than those of biological parents. While this inequality could be justified by public policy in support of nuclear families, the ambiguity created by varying state law is damaging to all American families, and the individual rights of all who wish to become parents. All the while, America's healthcare providers are serving as guardians of each of the unique human beings that remain in cryogenic preservation. The constitutional uncertainty created by the instant case, and the others cited above, potentially affects over 6.1 million American women with fertility problems.[2] The legal status of frozen human embryos is an unresolved problem of a constitutional dimension.

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[2] Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 Whittier L.Rev. 695, fn. 4 (2000).

II. PUBLIC POLICY REQUIRES CLEAR DEFINITIONS OF WHAT IT MEANS TO BE A "PARENT" OR "INTENDED PARENT"

This case calls directly into question what it means to be a "parent," and to have the rights associated with the legal status of "parenthood." If review is not granted, it would appear that millions of prospective natural and adoptive parents will have their rights determined by reference to mere property agreements and not by constitutional measure. The position of Washington and other states is inconsistent with this Court's own view of what it means to become a "parent."

The right of self determination, as exercised through becoming a "parent," has been consistently recognized as "fundamental." Indeed, "[F]reedom of personal choice in matters of family life is a fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). *Accord*; *Griswold v. Connecticut*, 381 U.S. 479 [recognition of fundamental rights in personal definitions of familial relations]. Counsel is aware of no case that suggests that, once one has become an intended parent or adoptive parent, one's rights are somehow unequal to those of biological parents. If the decision in the instant matter is allowed to stand, the fundamental right to become an adoptive parent is damaged.

The conclusion that the states may not interfere with the right to become a parent is established in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1943), wherein the Honorable Court stated that, "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder." [3]

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[3] *Also see, Parham v. J.R.*, 442 U.S. 584, 602 (1979). *See also, Stanley v. Illinois*, 405 U.S. 645, 651 (1972) [recognizing the interest of a parent

In fact, "Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship. [. . .] The constitutional interest in the development of parental and filial bonds free from governmental interference has many avatars. [. . .] And, above all, it is manifested in the reciprocal rights of parent and child to one another's 'companionship.'" *Franz v. United States*, 707 F.2d 582, fns. 53-57 (D.C. Cir., 1983).[4] Here, the states' treatment of IVF contracts and cryogenic preservation of human embryos suggest that the interest in companionship with one's children is de minimus or nonexistent.

In assessing the constitutional landscape presented here, the *Kass* Court recognized that:

> "Proliferating cases regarding the disposition of embryos, as well as other assisted reproduction issues, will unquestionably spark further progression of the law.

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in the management of the child's affairs}; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) [recognizing that parental rights are well established in American jurisprudence]; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) [referencing the fundamental liberty interest of natural parents in the care, custody and management of their children]; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) [parental rights to direct education of children]; *Doe v. Irwin*, 441 F.Supp. 1247 (Mich., 1985) [acknowledging rights of parents as deriving from First, Fifth, Ninth and Fourteenth Amendments to the Constitution]; *In the Interest of Cooper*, 631 P.2d 632 (Kan., 1981) [temporary losses of custody of children are grievous]. The rights to conceive and raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) [labeled as 'basic civil rights of man']; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)[recognition that parentage involves rights more precious than property rights].

[4] Citing, in part, *Quilloin v. Walcott*, 434 U.S. at 255; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley, Id.* at 405 U.S. 651; *Prince, Id.* at 166; *Parham, Id.*, at 602-604; *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d.Cir., 1977).

> [fn.]. What is plain, however, is the need for clear consistent principles to guide the parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated."

Kass, 91 N.Y.2d 564.

Unfortunately, the clarity desired by the 1998 *Kass* Court has not yet come to fruition. All the while, issues concerning the role of same sex relationships in reproductive technology, the participation of non-biologically related persons in the decisions of natural parents, and the "special" legal status of embryos, are coming to a critical mass.

While it is true that the law often procrastinates in its willingness to advance with technology, the Constitution should always serve in the role of being a ready guidepost for the direction of technology which affects the most basic aspects of our humanity. The states have failed in defining the role of the Constitution and have created more confusion than clarity in determining what it means to be a "parent" and "custodian" of human embryos. Moreover, Congress and the state legislatures have remained essentially silent on the issues herein, although fundamental constitutional rights hang in an undefined balance. For this reason, Petitioner respectfully prays for review in this case.

CONCLUSION

Review should be granted in this case.

Respectfully submitted,

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December 11, 2002